No. 95-233

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RAYTECH CORPORATION,

Petitioner,

vs.

EARL WHITE, YVONNE WHITE, PASQUALE DICINTIO, MARIE DICINTIO, LARRY BENZIE, EXECUTOR OF THE ESTATE OF EDWARD BENZIE, EUGENE KLINGENBERGER, MARGIE KLINGENBERGER, JOHN DOE, and all others similarly related,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS COMMITTEE OF UNSECURED CREDITORS OF RAYTECH CORPORATION, LARRY BENZIE, EXECUTOR OF THE ESTATE OF EDWARD BENZIE, EARL WHITE, YVONNE WHITE, EUGENE KLINGENBERGER AND MARGIE KLINGENBERGER

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LIST OF PARTIES

The parties to the proceeding below are:

Petitioner:

Raytech Corporation

Respondents:

Earl White, Yvonne White, Pasquale Dicintio, Marie Dicintio, Larry Benzie, Executor of the Estate of Edward Benzie, Eugene Klingenberger, Margie Klingenberger, John Doe individually and as class representative of all other similarly situated

Unsecured Creditors Committee

Oregon Claimants

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Rule Cited:

Supreme Court Rule 10 5

STATEMENT OF THE CASE

Raymond Schmoll sued Raymark Industries, Inc. and Raytech Corporation in the United States District Court for the District of Oregon for asbestos-related personal injuries. The issue presented to the court was whether Raytech was liable as a successor for Raymark Industries' production, sale and distribution of products containing asbestos. The district court found Raytech to be a successor in liability to Raymark Industries. *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868 (D. Or. 1988), *aff'd*, 977 F.2d 499 (9th Cir. 1992).

Shortly after Schmoll was decided, Raytech filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Connecticut. Raytech filed an adversary proceeding in the Bankruptcy Court seeking a declaratory judgment that neither Raytech nor any of its subsidiaries was a successor in interest to Raymark Industries or Raymark Corporation. The adversary proceeding was removed to the district court. The district court found Raytech collaterally estopped by the ruling in *Schmoll* and dismissed Count I of the adversary proceeding. The case was transferred to the United States District Court for the Eastern District of Pennsylvania and appealed to the Court of Appeals for the Third Circuit.

The Third Circuit affirmed:

> Having found the requisite identity of issues and having concluded that essential facts have not changed between the time *Schmoll* was decided and the time the district court applied the doctrine of collateral estoppel in this case, we cannot but conclude that the district court did not abuse its discretion in

> barring the relitigation of Raytech's successor liability.

Raytech Corp. v. White, 54 F.3d 187, 196 (3d Cir. 1995).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The decision sought to be reviewed turns on whether the Oregon law of successor liability is idiosyncratic or is the same as the law of successor liability in all other jurisdictions. No issue of federal jurisprudence is presented, much less any "special and important reasons" warranting review on writ of certiorari.

Raytech contends that the Third Circuit misapplied the principles of offensive collateral estoppel stated in *Montana v. United States*, 440 U.S. 147 (1979). In its Petition for Certiorari, Raytech argues (i) that the district court in Oregon improperly found Raytech liable as a successor for Raymark's asbestos-related liabilities and (ii) that the district court in Connecticut and the Third Circuit improperly found that the issue presented by the adversary proceeding was in substance the same issue as that resolved in the *Schmoll* litigation.

Raytech's quarrel is not with the application of *Montana*. It is with the determination that the successorship law of Oregon is the same as the successorship law of all other states.

Raytech also contends that the Third Circuit misapplied the new value exception stated in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939). Under that exception a reorganization plan may permit stockholders to share in

distributions in violation of the absolute priority rule. This case did not involve a reorganization plan. *Los Angeles Lumber* is inapposite.

II.

THE PRINCIPLES OF *MONTANA V. UNITED STATES* WERE APPLIED CORRECTLY BY THE THIRD CIRCUIT.

A. The Third Circuit Applied the Correct Test.

In *Montana,* a government contractor attacked the constitutionality of Montana's imposition of a 1% gross receipts tax upon contractors of public, but not private, construction projects. The issue was whether a prior judgment by the Montana Supreme Court upholding the tax precluded the United States from contesting its constitutionality. The Court found that the constitutional question was determined adversely to the United States in the prior state proceeding. It reversed the lower court on grounds of collateral estoppel.

The Court stated:

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5 (1979).

440 U.S. at 154.

> To determine the appropriate application of collateral estoppel . . . necessitates three further inquiries: first, whether the issues presented by this litigation are in substance the same as those resolved against the United States in *Kiewit I;* second, whether controlling facts or legal principles have changed significantly since the state-court judgment; and finally, whether other special circumstances warrant an exception to the normal rules of preclusion.

440 U.S. at 156.

In *Parklane,* the Court determined that a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" to prevent a defendant from relitigating issues resolved in the prior proceeding. 439 U.S. at 327. The Court concluded:

> that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.

439 U.S. at 332.

Pursuant to *Montana,* three issues were considered by the Court of Appeals for the Third Circuit:

> (1) Was the issue before the court in *Schmoll* identical to the issue raised by Raytech in its adversary proceeding before the district court in Connecticut?

> (2) Did facts "essential to the judgment" in *Schmoll* change?
>
> (3) Was the application of offensive collateral estoppel unfair to Raytech?

54 F.3d at 191.

Even if the Third Circuit had decided each of these issues incorrectly — which it did not — there would still be no "special and important reasons" under Supreme Court Rule 10 for granting Raytech's petition. But in any event, as Respondents next show, the Third Circuit decided each of the issues correctly.

B. The Third Circuit Correctly Decided the Adversary Proceeding.

Raytech's principal contention appears to be that *Schmoll* itself was incorrectly decided. Petition for Writ of Certiorari at 11-13. The Ninth Circuit decision to the contrary having become final, that argument can not now be heard.

(a) *The issues in the two cases are identical.* At issue in *Schmoll* was whether Raytech was liable as a successor for Raymark Industries' production, sale and distribution of products containing asbestos. At issue in this adversary proceeding was whether Raytech or any of its subsidiaries was a successor in interest to Raymark Industries.

According to *Schmoll,* Oregon law rejects corporate restructuring carried out to escape liability. The Oregon court found that Raymark's corporate restructuring was designed with the improper purpose of escaping asbestos-related liabilities.

Raytech says that this is not identical to the issue presented

to the Third Circuit because that circuit needed to find that the transfer of assets was for the fraudulent purpose of escaping liability. *Schmoll* did not use the word "fraudulent". Therefore, the issues are different.

As the Third Circuit stated:

> To impose liability on the successor corporation, the law in every jurisdiction, including Oregon, requires a finding that the corporate transfer of assets "is for the *fraudulent purpose* of escaping liability." . . . The word "fraudulent" . . . characterizes or modifies . . . the *purpose* of such transfer.

54 F.3d at 192 (emphasis in original).

Schmoll expressly found the same purpose to be "improper." The Third Circuit concluded that the *Schmoll* court relied on the same factors that all courts consider when determining whether a transfer of corporate assets was for the fraudulent purpose of escaping liability. Thus, the issues were "in substance the same." 54 F.3d at 193.

(b) *No change in facts essential to the Schmoll judgment occurred.* Raytech argues that had the *Schmoll* court known that Raytech would continue to make payments to Raymark, the outcome would have been different. This argument was presented to, and rejected by, both the district court in *Schmoll* and the Ninth Circuit when *Schmoll* was appealed to it. *Schmoll* did not rely on inadequacy of consideration or doubts about whether it would be paid. *Schmoll* rested on the improper intent of the transaction. There has been no change in the "essential facts." *See* 54 F.3d at 193-195.

(c) *It is not unfair to apply collateral estoppel.* Raytech

relies for this prong of its argument on its continued payment of its obligations to Raymark. Neither the district court in Connecticut nor the Third Circuit believed it was unfair to apply collateral estoppel. *See* 54 F.3d at 195-196. This conclusion was within their sound discretion.

III.

THE PRINCIPLES IN *CASE V. LOS ANGELES LUMBER PRODUCTS CO.* DO NOT APPLY TO THIS CASE.

Case v. Los Angeles Lumber Products Co., 308 U.S. 106 (1939), presented the question of the conditions under which stockholders may participate in a plan of reorganization under § 77B of the Bankruptcy Act where the debtor corporation is insolvent both in the equity and in the bankruptcy sense. The Court held that a plan of reorganization was required to be "fair and equitable" to be confirmed. "Fair and equitable" meant that the stockholders' interests were subordinate to the rights of creditors.

The Court did state:

> It is, of course, clear that there are circumstances under which stockholders may participate in a plan of reorganization of an insolvent debtor . . . Where that necessity [seeking new money "essential to the success of the undertaking" from the old stockholders] exists and the old stockholders make a fresh contribution and receive in return a participation reasonably equivalent to their contribution, no objection can be made.

308 U.S. at 121.

In *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988), this Court did not comment on the continuing vitality of the *Los Angeles Lumber* exception to the absolute priority rule. The Court concluded in *Ahlers* that even if an "infusion of 'money-or-money's worth' " exception to the absolute priority rule has survived the enactment of § 1129(b) of the Bankruptcy Code, the proposed contribution of future labor, management or expertise did not qualify. 485 U.S. at 204 n. 3.

How do these cases relate to this case? When *Schmoll* was decided in the Oregon district court, neither Raymark nor Raytech was in bankruptcy. No reorganization plan was in existence.

When the Connecticut district court decided this adversary proceeding Raytech was in bankruptcy. But no reorganization plan was in existence. The confirmability of a plan under § 1129(b) of the Bankruptcy Code — the issue to which the new value exception applies — was not considered. Nor could it be until and unless a plan of reorganization for Raytech were proposed.

Even if a reorganization plan were proposed the contribution of former Raytech stockholders of cash in 1987 would not be considered new value for a plan proposed at a later date. In *Los Angeles Lumber* the stockholders had contributed $400,000 new money as part of an out of court reorganization. Nevertheless, this contribution of cash was not even mentioned as a possible justification for the issuance of stock to them in the reorganization plan in the bankruptcy case.

For the new value exception to apply in this case, Raytech stockholders would now have to contribute cash to a reorganization plan. Their past contributions are irrelevant.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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